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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1051

JACK SOLONER, President, ROBERT C. BRENNAN, Secretary-Treasurer, and AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 492, *Petitioners,*

v.

ROBERT A. GARTNER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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January 26, 1968.

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v.

ROBERT A. GARTNER, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners herein respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 1, 1967.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, dated September 1, 1967, is reported in 384 F. 2d 348 and is reproduced in Appendix A hereto, p. 1a, *infra.*

The findings of fact, discussion and conclusions of law of District Judge Luongo of the United States District Court for the Eastern District of Pennsylvania, entered on February 28, 1966, and his ensuing order entered on April 18, 1966, are not reported. They are reproduced in Appendix B hereto, p. 20a, *infra*.

JURISDICTION

The final order of the District Court, based upon earlier findings of fact, discussion and conclusions of law, was entered on April 18, 1966. The opinion and judgment of the Court of Appeals for the Third Circuit, reversing the judgment of the District Court to the extent that it held that counsel fees could not be awarded to the respondent, Gartner, was entered on September 1, 1967. A timely filed petition for rehearing was denied by the Third Circuit on October 30, 1967. This petition for writ of certiorari was filed within 90 days of that denial of rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether § 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 412, which authorizes civil actions in federal district courts "for such relief (including injunctions) as may be appropriate" by individuals whose rights under Title I of the Act have been infringed, permits an award of counsel fees incurred in a successful prosecution of such an action.

STATUTORY PROVISIONS INVOLVED

Section 102 of the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act), 29 U.S.C. § 412:

> Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

STATEMENT OF THE CASE

The specific and narrow issue involved in this petition arose out of the following circumstances:

The respondent Robert A. Gartner is an employee of National Biscuit Company and is a member of Local 492, American Bakery & Confectionery Workers International Union, AFL-CIO. In 1961, as a member of a minority group within the Local, the respondent protested alleged denials of the members' voting rights in connection with an election of officers held by Local 492. He picketed the Local's offices, carried placards that disparaged certain Local officers, and allegedly exhibited bad faith in seeking the investigative aid of the International Union and the United States Department of Labor.[1] J.A. 10a-11a.

Thereafter, upon duly filed charges and after a hearing, the Executive Board of Local 492 found the respondent guilty of unauthorized picketing and fined him $50; he was also found guilty of bad faith in seeking the assistance of the International Union and the Department of Labor and fined $25. For both of these

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[1] The Bureau of Labor-Management Reports conducted an investigation and concluded that no violation of law occurred which might have affected the outcome of the Local's election. J.A. 10a.

offenses he was suspended from the union for a period of one year. J.A. 11a. The respondent refused to pay these fines; as a result, his appeal to the International Union was denied. J.A. 11a.

The respondent then brought a civil action in 1963 in the United States District Court for the Eastern District of Pennsylvania under § 102 of Title I of the Landrum-Griffin Act, technically known as the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401-531. The respondent there sought to enjoin the petitioners' actions in fining and suspending him from membership and to enjoin them from depriving him of his rights as a member of Local 492 in good standing. He also sought damages under the Act, together with "counsel fees, costs and all other expenses necessarily incurred by plaintiff in connection with this action". J.A. 7a.

On July 3, 1963, District Judge Wood entered a preliminary injunction vacating respondent's suspension from membership in Local 492 and directing the Local and its officers to take no action depriving respondent of his right to attend and participate in Local 492 membership meetings or otherwise depriving him of his rights as a member in good standing. J.A. 9a-15a. In issuing this injunction, Judge Wood ruled that the respondent had stated a claim under § 101(a)(2) of the Act, 29 U.S.C. § 411(a)(2),[2] and that he was entitled to express his opinions by advertising his beliefs

[2] Sec. 101(a)(2) of the Act provides that every member of a labor organization "shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions . . .," conditioned only on the labor organization's right "to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution . . ."

on the picket line; his contacts with the International Union and the Department of Labor were held not to evidence bad faith. J.A. 13a-14a. The court thereupon concluded that the suspension and fining of the respondent were in violation of §§ 101(a)(2) and 609 of the Act, 29 U.S.C. §§ 411(a)(2) and 529.[3] J.A. 14a.

The matter subsequently came on for final hearing before District Judge Luongo, who on February 28, 1966, made permanent the prior temporary injunction. J.A. 36a-43a; Appendix B hereto, pp. 20a-27a, *infra*. The court concluded that the suspension and fining of the respondent were in violation of §§ 101(a)(2) and 609 of the Act, 29 U.S.C. §§ 411(a)(2) and 529, and that he would be irreparably harmed if the preliminary injunction were not made permanent. But District Judge Luongo denied respondent's request for punitive damages. He also denied the request for reimbursement for amounts expended "for legal services in securing reinstatement to membership in the Union or for wages lost while attending Union hearings or court proceedings". J.A. 43a; see p. 27a, *infra*. The denial of such counsel fees was premised exclusively upon the provisions of § 102 of the Act, 29 U.S.C. § 412, which authorizes suits of this nature "for such relief (including injunctions) as may be appropriate."

The Court of Appeals for the Third Circuit, by a divided 2-1 vote, reversed that part of the District Court judgment holding that as a matter of law counsel

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[3] Section 609 of the Act, 29 U.S.C. § 529, makes it unlawful for any labor organization or officer thereof "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable in the enforcement of this section."

fees could not be awarded a successful plaintiff in this type of action. The term "appropriate relief", as used in § 102, was said, when "fairly construed", to include proper counsel fees. District Judge Nealon dissented, finding no Congressional language or authorization for reimbursement of counsel fees in these circumstances.

REASONS FOR GRANTING THE WRIT

The decision of the Third Circuit involves an important and recurring question in the interpretation and application of the most frequently invoked section of the Landrum-Griffin Act. And by ruling that counsel fees can be awarded a successful plaintiff in an action under § 102 of the Act, the Third Circuit has reached a result in conflict with all prior federal court decisions on that issue and in conflict with the legislative history of § 102. Even more importantly, the Third Circuit has contradicted and confused several principles of statutory interpretation regarding the award of counsel fees in federally created causes of action, as enunciated by this Court only last Term in *Fleischmann Corp.* v. *Maier Brewing Co.*, 386 U.S. 714.

For these various reasons, elaborated below, the appropriateness of reviewing the judgment below becomes most compelling.

1. The Decision Below Conflicts With and Confuses the Principles Recognized by This Court in the Fleischmann Case.

In *Fleischmann Corp.* v. *Maier Brewing Co.*, 386 U.S. 714, this Court ruled that in a trademark infringement suit under § 35 of the Lanham Act counsel fees are not recoverable by a successful plaintiff without specific statutory warrant therefor. In so ruling, the

Court recognized that the historic American rule "has long been that attorney's fees are not ordinarily recoverable in the absence of statute or enforceable contract providing therefor." 386 U.S. at 717. And that rule was held to be decisive in the interpretation and application of the federal statute there involved. There being no express provision in § 35 of the Lanham Act authorizing the recovery of counsel fees, and the legislative history indicating that none was intended, the Court ruled that the right to recover such fees "should not readily be implied," 386 U.S. at 720, from any equitable or other inherent power possessed by a federal court.

The decision of the Third Circuit in the instant case not only is at war with several aspects of the *Fleischmann* ruling but has created various problems as to the scope and meaning of the principles utilized therein:

(1) Contrary to the *Fleischmann* approach to the problem of statutory interpretation, the Third Circuit "readily . . . implied" from the general language of § 102 of the Landrum-Griffin Act judicial power to award counsel fees to a successful plaintiff. It did so by reading into the § 102 language—which merely empowers federal district courts to grant "such relief (including injunctions) as may be appropriate"—a power that in the Third Circuit's words "is practically unlimited in view of the courts' legal and equitable jurisdiction." See p. 13a, *infra*.

But § 35 of the Lanham Act, which was under consideration in *Fleischmann,* was even more susceptible to the Third Circuit's device of broad incorporation of a court's equitable powers. That section provided,

"subject to the principles of equity," for the recovery of profits, damages and "the costs of the action". And by reference to the federal court's recognized power "to do equity in a particular situation," *Sprague* v. *Ticonic National Bank,* 307 U.S. 161, 166, it was urged that an award of attorney's fees could be supported as a necessary equitable power exercisable under § 35.

But the whole point of the *Fleischmann* ruling was that such general equity powers do not normally authorize the award of counsel fees "in the context of statutory causes of action for which the legislature has prescribed intricate remedies," 386 U.S. at 719, and where such an award is not expressly ordained. Only "when overriding considerations of justice seemed to compel such a result," said this Court, 386 U.S. at 718,[4] can a general equitable power to award counsel fees be read into a court's administration of a federal cause of action. No such "overriding considerations" were found present in *Fleischmann.*

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[4] The only "overriding considerations of justice" mentioned in *Fleischmann* which in the past have justified the award of counsel fees are (386 U.S. at 718-719):

(1) An award of counsel fees in "appropriate circumstances" to an admiralty plaintiff as an item of compensatory damages. *Vaughan* v. *Atkinson,* 369 U.S. 527.

(2) An award of fees in a civil contempt action, occasioned by willful disobedience of a court order, as part of the fine to be levied on the defendant. *Toledo Scale Co.* v. *Computing Scale Co.,* 261 U.S. 399, 426-428.

(3) An award of counsel fees, to be paid by those benefiting from a common fund created by the plaintiff's efforts, where those benefiting would otherwise be unjustly enriched at plaintiff's expense. *Sprague* v. *Ticonic National Bank,* 307 U.S. 161.

None of those considerations are any more present in the instant case than they were in *Fleischmann.*

Here, the Third Circuit, which cited the general equitable power of federal courts as recognized in the *Sprague* case, purported to find an overriding consideration justifying the award of counsel fees in the assertion that Congress could not have intended to "slam the door" on the aggrieved union member's right to vindicate his statutory "bill of rights" under § 102 "when confronted with the insurmountable obstacles of prohibitive legal expenses." See p. 15a, *infra.*

But is that the kind of "overriding consideration" that *Fleischmann* indicated might overcome the traditional rule against the award of counsel fees in the absence of specific statutory authorization? Whenever Congress has created privately-enforceable rights must it be assumed that it meant to invoke the equitable power of the judiciary so that those rights might be vindicated free of legal expense? Or, in the context of the Landrum-Griffin Act, can it be said that, despite its silence, Congress intended that labor unions finance the legal costs of those members who sue to redeem their personal rights under Title I? These are among the questions posed by the Third Circuit's assumption that "overriding considerations" precluded application of the *Fleischmann* rule to § 102 of this Act. They are questions that deserve consideration and answer by this Court.

(2) The Third Circuit further ruled, see pp. 13a, 14a (fn. 12), *infra.*, that § 102 of the Landrum-Griffin Act is "not of the limiting type found in *Fleischmann*" and is "not the type of statutory cause of action that prescribes 'intricate remedies' "—hence, it was said not "to restrict recovery to those remedies which are expressly set forth in the statute." The court thought that the language of § 102, empowering the award of

"such relief (including injunctions) as may be appropriate," provides a flexibility whereby legal and equitable power may be exercised in "practically unlimited" fashion.

But does the *Fleischmann* ruling mean to limit the search for a statutory scheme of "intricate remedies," for purposes of applying the historic rule against the award of counsel fees, to those specific remedies spelled out in the particular section of a statute under which suit is brought? Or does the stretch of "intricate remedies" encompass the entire statute under consideration?[5]

Even if § 102 be viewed in isolation, it is questionable whether the "appropriate relief" there authorized justifies anything more than substantive relief in the nature of injunctions, damages, accountings and declaratory judgments, as distinguished from peripheral relief such as costs, expenses or counsel fees.[6] But when the entire Landrum-Griffin Act is viewed, a careful and explicit set of "intricate remedies" becomes evident.

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[5] In *Fleischmann*, this Court referred not only to § 35 of the Lanham Act in defining the "intricate remedies" but also to § 34 thereof and generally to "the Lanham Act." 386 U.S. at 719, particularly fn. 12.

[6] Congress used the phrases "appropriate relief" and "such relief (including injunctions) as may be appropriate" no less than six times in the Landrum-Griffin Act. See §§ 102, 104, 210, 304(a), 501(b). In three instances, §§ 104, 210, 304(a), the phrase "such relief (including injunctions) as may be appropriate" identifies the type of relief which the Secretary of Labor alone may seek, relief which plainly would not encompass counsel fees incurred by the Secretary if such there be. And in one instance, § 501(b), union members may recover damages or secure an accounting "or other appropriate relief," *plus* "the fees of counsel" and "any expenses" of the litigation.

A union member's suit under § 102 is but one of the "intricate remedies" afforded such private individuals under the Act; see also §§ 201(c), 304(a), 501(b). Among the other "intricate remedies" for vindication of the legislative policies are not only various criminal sanctions but specified civil remedies allowable only to the Secretary of Labor. See, e.g., §§ 104, 210, 304(a), 402(b). And perhaps most relevant of all is the fact that in two instances and only in two instances—not including § 102—Congress has specifically mentioned counsel fees as being recoverable by a successful private litigant. See §§ 201(c), 501(b).[7]

The Third Circuit's concept of what this Court meant in *Fleischmann* by "intricate remedies" in a federal statute generates an obvious need for further consideration and clarification of the problem by this Court.

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[7] Under § 201(c), a union member may sue to enforce the labor organization's duty to make available certain specified information and records; and the court may, "in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

Under § 501(b), a union member may sue an officer or agent of the labor organization "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization" where such organization has refused or failed to sue those officers who have violated their fiduciary obligations. In such a suit, the court "may allot a reasonable part of the recovery . . . to pay the fees of counsel . . . and to compensate such members for any expenses" incurred in connection with the litigation.

In both these instances Congress plainly distinguished counsel fees from the judgment or relief accorded the plaintiff on the substantive aspects of his complaint.

2. The Decision Below as to the Recoverability of Counsel Fees in a § 102 Proceeding Is in Conflict With All Prior Federal Court Rulings.

In every recorded instance where the issue has been raised, other lower federal courts have viewed § 102 as depriving them of power to award counsel fees to a successful plaintiff.

Most of these decisions have been rendered by federal district courts. Thus, in *Cole* v. *Hall,* 35 F.R.D. 4, 8 (E.D. N.Y.), the court ruled that "no basis for such a claim [for counsel fees] exists under the Act, . . . When Congress intended to include counsel fees in a plaintiff's recovery, it did not hesitate to express itself as it did in Section 501(b) of Title V of the Act. No such similar provision appears in Title I." In *Vars* v. *International Brotherhood of Boilermakers,* 215 F. Supp. 943, 952 (D. Conn.), the court after reviewing the legislative history of § 102 concluded that "In its wisdom Congress refrained from including attorney's fees as an item of damages . . . Counsel fees and expenses are not compensable damages and are hereby denied." And in *McCraw* v. *United Ass'n of Journeymen,* 216 F. Supp. 655, 664 (E.D. Tenn.), the court denied counsel fees in a § 102 proceeding on the ground that the legislative history "reflects that the Bill [Act] was so interpreted at the time of its enactment" and that the court was "therefore without jurisdiction to award attorney fees on this phase of the lawsuit." See also, to the same effect, *Jacques* v. *Local 1418,* 246 F. Supp. 857 (E.D. La.); *Leonard* v. *M.I.T. Employees' Union,* 225 F. Supp. 937 (D. Mass.); *Magelssen* v. *Local*

Union 518, 240 F. Supp. 259 (W.D. Mo.); *Bailey* v. *Netter,* 266 F. Supp. 165 (E.D. La.)[8]

Two of the foregoing district court decisions were affirmed on appeal. The Second Circuit affirmed the *Vars* decision, but did not discuss the question of counsel fees. 320 F. 2d 576. But the Sixth Circuit, in affirming the *McCraw* ruling, expressly recognized the lower court ruling that there was no jurisdiction to award attorney's fees on the § 102 phase of the case and gave implied approval to that ruling. 341 F. 2d 705 at 710. Such approval, of course, directly conflicts with the Third Circuit's action in the instant case.

The Third Circuit here purported to find judicial sanction for its conclusion in *Johnson* v. *Nelson,* 325 F. 2d 646 (C.A. 8). But the *Johnson* case, as the court below was forced to acknowledge in footnote 3 of its opinion (see p. 7a, *infra*), arose under § 501(b) of the Act, which contains express authority for the award of counsel fees when a union member sues to enforce an officer's fiduciary obligations. The *Johnson* ruling has no relevance to a § 102 proceeding.

The unanimity of other judicial authority as to the lack of power to award counsel fees under § 102 attests to the serious conflict created by the Third Circuit and to the need for resolution of that conflict by this Court. It is a conflict made even more manifest by the dissenting views of Judge Nealon in this case. See p. 16a, *infra.*

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[8] See, generally, Annotation, Prevailing Union Member's Right to Recover Attorneys' Fees in Action Against Union or Union Officers, 9 A.L.R. 3d 1045.

3. The Decision Below Raises Important Problems of Statutory Analysis.

The Third Circuit, in its interpretation and analysis of § 102, has utilized techniques that are highly questionable and that deserve most careful review by this Court.

The court below, of course, had to concede that § 102 contains no express provision authorizing the award of counsel fees. It further conceded "that some members of Congress wished to provide expressly for counsel fees under Section 102" (p. 9a, *infra*) and that dissenters from the version of § 102 finally adopted were extremely critical of its failure to permit such a fee recovery (see pp. 7a-8a, *infra*). As Senator Goldwater complained, § 102 "does not grant him [the union member], even where successful in his suit, reasonable counsel fees or other costs. It thus forces him to assume the entire financial burden of the litigation." Legislative History of the Act, Vol. II, p. 1281 (N.L.R.B. ed.).

Yet the Third Circuit brushed aside the clear omission from § 102 of any provision for counsel fees with the suggestion that the legislative intent to provide broad legal and equitable relief under § 102 necessarily encompassed the right to award counsel fees. Such an analysis is highly suspect on several grounds:

(1) The legislative drafters of the Landrum-Griffin Act obviously knew of the possibility and appropriateness of permitting the award of counsel fees. As the court below noted, such an award was considered for inclusion in § 102 and yet consciously was omitted. In two other sections of the Act, §§ 201(c) and 501(b), provision was expressly made for such an award. In

such circumstances, the failure to include counsel fees in the relief authorized by § 102 must be given great and probably controlling significance. The Third Circuit's speculations (see pp. 15a-16a, *infra*) as to the appropriateness and need of awarding counsel fees in this situation can hardly do service for what Congress deliberately omitted.

(2) Congress must be presumed to be aware of what this Court in *Fleischmann* referred to as the historic American rule against the award of counsel fees in statutory causes of action in the absence of express authorization. And the mere fact that Congress provided for broad and unidentified forms of "appropriate relief" in § 102 cannot, in view of the considerations set forth in the *Fleischmann* opinion, be read as indicative of a legislative intent to repeal the historic rule and to rely exclusively upon a court's feeling that "overriding considerations of justice" compel the award of counsel fees. Nor should such a broad reference to "appropriate relief" entitle a court, as the Third Circuit has done, to ignore the *Fleischmann* rationale and to read into those broad words a judicial authorization to provide a remedy Congress did not see fit to provide.

(3) The entire pattern of the Landrum-Griffin Act, involving a scheme of "intricate remedies," demonstrates a careful legislative delineation of those circumstances or causes of action where recovery of counsel fees was thought appropriate and where it was thought not appropriate. As was noted in the *Fleischmann* opinion, 386 U.S. at 720-721, Congress has with some frequency and in a wide spectrum of federal legislation "selectively provided a similar remedy [recovery of counsel fees] in connection with various other statutory

causes of action." That legislative history of selectivity with respect to such a remedy should militate against implying this remedy where Congress has not clearly spoken.

(4) The general rule against implying a remedy not provided for by Congress should apply most forcefully with respect to private causes of action created by statute. Whatever the justification for reading broad powers into the hands of a public official charged with enforcing a statutory policy, see *Porter* v. *Warner Holding Co.*, 328 U.S. 395, and *Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n.*, No. 57, Oct. Term, 1967 (decided January 15, 1968), the remedies available to a private litigant should be more strictly construed, consistent with the legislative intent and traditional rules of construction. Especially should such a strict construction be favored where, as here, the remedy made available by implication would tend to encourage more federal court litigation, including much that is without merit.

(5) Since the Act represents a coordinated series of limited and specific intrusions upon the internal affairs and freedoms of labor unions, rather than a wholesale and general transfer to the courts of the internal operations of labor organizations,[9] a court should hesitate to expand the sanctions Congress made available with respect to such statutorily authorized intrusions. Without some express legislative language permitting recovery of counsel fees, therefore, it should not lightly

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[9] "The provisions of the L.M.R.D.A. were not intended by Congress to constitute an invitation to the courts to intervene at will in the internal affairs of unions." *Gurton* v. *Arons*, 339 F. 2d 371, 375 (C.A. 2).

be assumed that Congress intended to add to the limited statutory obligations of labor organizations by imposing on them the potential obligation to pay all counsel fees of those union members whose private rights under Title I have been judicially vindicated and otherwise made whole.

The Third Circuit has in effect amended the plain language of § 102 without legislative authorization. It has done so by questionable interpretative means. That judicial amendment, involving as it does a most important piece of federal legislation, should be carefully examined and reviewed by this Court. Without such a review, the decision below will likely become a most dubious yet influential precedent, perpetuating a remedy which no element of legislative intent or statutory analysis can justify.

4. The Question Raised Is an Important and Recurring One in the Administration of the Act.

The importance of the question as to the recoverability of counsel fees and the appropriateness of the grant of certiorari are heightened by the fact that countless pending and potential lawsuits by union members under § 102 of the Act are affected by this problem. Section 102, creator of Title I litigation, is probably the most prolific source of private litigation under the Act, making the question here presented a constantly recurring one. As has been said by the Office of the Solicitor of the Department of Labor,[10]

> "Since September 14, 1959, the effective date of the Act, there have been approximately 850 pri-

[10] Letter dated October 25, 1967, to Alan R. Howe, Esq., one of counsel for petitioners, and signed by George T. Avery, Esq., Associate Solicitor, Office of the Solicitor, U.S. Department of Labor, Washington, D. C.

vate actions filed under the first six titles of the L.M.R.D.A. While this office does not maintain a listing of these cases according to the particular titles involved, we estimate that 650 were filed under Title I, 30 under section 201(c) and 50 under section 501(b)."

Until the question is settled authoritatively by this Court, therefore, confusion and uncertainty will mark the counsel fee aspect of this multitudinous litigation. The interests of uniform and certain administration of this important provision of the Act make the grant of certiorari most compelling.

CONCLUSION

For these various reasons, certiorari should issue to review the judgment below.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

ROBERT A. GARTNER, *Appellant*,

v.

JACK SOLONER, President, and ROBERT C. BRENNAN, Secretary-Treasurer, and AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 492, *Appellees*.

No. 16291.

Argued April 3, 1967.

Decided Sept. 1, 1967.

Rehearing Denied Oct. 27, 1967.

Joseph A. Malloy, Jr., Hamilton, Darmopray & Malloy, Philadelphia, Pa., for appellant.

Alan R. Howe, Philadelphia, Pa., (Edward Davis, Philadelphia, Pa., on the brief), for appellees.

Before McLAUGHLIN and GANEY, Circuit Judges, and NEALON, District Judge.

Opinion of the Court

GERALD McLAUGHLIN, Circuit Judge.

This appeal involves solely the question of whether counsel fees are allowable under Section 102 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 73 Stat. 523 (1959), 29 U.S.C. § 412 (1964).

Appellant Robert Gartner was fined and suspended from Local 492 of the American Bakery and Confectionery Workers International Union, AFL-CIO, allegedly for protesting a denial of voting rights to union members. Gartner's appeal to the Union International was turned down and on June 24, 1963 he instituted this action under the

Labor-Management Reporting and Disclosure Act of 1959. Aside from injunctive relief appellant sought counsel fees and other expenses incurred in pursuit of his rights under the LMRDA. The Court below found that the action taken by the union was in violation of 29 U.S.C.A. §§ 411(a) (2) and 529, Sections 101(a) (2) and 609 of the Act. Although a permanent injunction in favor of appellant was filed on April 18, 1966, Gartner's claim for money damages was rejected by the District Court. Discussing the findings of fact the District Judge concluded that counsel fees could not be awarded under Section 102. We believe that decision must be reversed.

Title I of the LMRDA is the so-called civil rights provision of the Act. These rights are those possessed by the rank and file union members and are enumerated in Section 101. Section 102 provides for civil enforcement in the event a person's rights under Title I have been infringed upon. Section 102 reads:

> "Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

Legislative History [1]

The LMRDA originated with the reporting of the Kennedy-Ervin Bill to the Senate by the Committee on

[1] The legislative history of the LMRDA is reproduced in a two volume work published by the National Labor Relations Board and printed by the Government Printing Office. The notation "Leg. Hist." will indicate future references to this work.

Labor and Public Welfare on April 14, 1959. However, that bill made no mention of a union member's bill of rights. The bill of rights along with the section pertaining to the civil enforcement of those rights was proposed as an amendment to the Kennedy-Ervin Bill by Senator McClellan. The enforcement section of that amendment provided:

> "The Secretary, whenever it shall appear that any person has violated or is about to violate any of the provisions of this title, may bring an action in a district court or other court of the United States for such relief as may be appropriate including, but without limitation, injunctions to restrain any such violations and to compel compliance with this title. Any such action against a labor organization may be brought in the United States District Court for the District of Columbia or in the district court or other court of the United States where the violation occurred or is about to occur." Leg.Hist., Vol. II, p. 1102.

Those critical of the enforcement provision were concerned with the bureaucratic chaos that might result if the Secretary of Labor were required to initiate all complaints on behalf of aggrieved union members. Leg.Hist., Vol. II, pp. 1111-1114. To dispel these fears an amendment was offered by Senator Kuchel of California giving the union member, not the Secretary of Labor, the right to seek relief in the federal courts. The Kuchel amendment became the version ultimately adopted by the Senate and states:

> "Any person whose rights secured by the provisions of this title have been infringed may bring an action in a district court of the United States for such relief as may be appropriate. Any such action against a labor organization shall be brought in the United States district court for the district where the alleged violation occurred, or where the headquarters of such

labor organization is located." Leg.Hist., Vol. II, p. 1221.

In the House of Representatives the Landrum-Griffin Reform Bill (H.R. 8400, Leg.Hist., Vol. I, p. 619) was introduced as a substitute for the Kennedy-Ervin Bill, but contained basically the same remedy for civil enforcement of the bill of rights. Leg.Hist., Vol. I, pp. 631, 632. Thereafter the only substantial alteration was the parenthetical insertion of the words "including injunctions" to insure that at least an injunction would be considered appropriate relief under Section 102.

Court Decisions

The first case to rule on the propriety of counsel fees under Section 102 was Vars v. International Brotherhood of Boilermakers, 215 F.Supp. 943 (D.Conn. 1963), where the court found that such allowances were intentionally excluded by Congress. As indicative of the legislative intendment the court referred to the dissenting House Report which stated:

> "One of the most serious inadequacies of the Senate bill is the lack of any effective enforcement procedure to protect union members from those few union officials who fail to recognize that a union belongs to its members. Under that bill the individual member must shoulder the burden of litigation costs himself. The union officer [sic], on the other hand, have the entire resources of the union at their disposal. This impractical enforcement method is weakened still further in the committee bill." U.S. Code Cong. & Ad.News, Legislative History, Vol. 2, 86th Cong., 1st Sess., p. 2492 (1959).

The Second Circuit affirmed the District Court decision, Vars v. Int'l Bhd. of Boilermakers, 320 F.2d 576 (2 Cir.

1963), but without mention of the lower court's disposition on the matter of counsel fees.

In McCraw v. United Ass'n of Journey. & App. of Plumbing, 216 F.Supp. 655 (E.D.Tenn.1963), the court was asked to consider counsel fees as appropriate relief under Section 102. Once more the court was of the opinion that the legislative history of the LMRDA militated against such recovery. Here, however, the court was persuaded by the following remarks of Senator Goldwater:

> "Although the bill permits the union member himself to sue for infringement of his rights, the nature of the suit is such as to promise, even if successful, little in the way of monetary damages except in the rare case where the plaintiff's job rights or job tenure have been adversely affected. Moreover, the bill does not grant him, even where successful in his suit, reasonable counsel fees or other costs." Leg.Hist., Vol. II, p. 1281.

On appeal the Sixth Court affirmed the District Judge's finding " * * * that no provision is made for the allowance of attorney's fees in an action under Section 101 or 102 of the Act. * * *." McCraw v. United Ass'n of Journey. & App. of Plumbing, 341 F.2d 705, 710 (6 Cir. 1965).

The decision in Code v. Hall, 35 F.R.D. 4 (E.D.N.Y.1964), although acknowledging that counsel fees might be granted in an action at common law,[2] found no basis for such a

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[2] The common law recovery mentioned by the court was one cognizable in a state court action. Although the problem was not discussed in Cole, the propriety of allowing counsel fees in an action before a state court raises the question as to whether federal courts sitting in states permitting such recovery could properly follow suit under Section 103 of the LMRDA, 29 U.S.C.A. § 413, which provides that "Nothing * * * shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the

claim under the LMRDA. Beside relying on the Vars and McCraw cases the court in Cole thought it significant that Section 501(b) of Title V of the LMRDA made allowances for fees and if Congress had intended to make a similar provision in Title I it would have so acted.

Johnson v. Nelson, 325 F.2d 646 (8 Cir. 1963) lends solid support to appellant's position. There, internal union strife arose over the payment of attorneys' fees incurred by union members after they had successfully asserted their rights under Title I of the Act. A Special Trial Board, constituted pursuant to a stipulation entered into in the first federal court (Title I) proceeding, recommended that attorneys' fees and expenses for both sides in the conflict be paid by the union local. The recommendation was then approved by a constitutional vote of the local membership. When the union would not comply with the Board's directive or recognize the membership vote an action was commenced under Title V, Section 501(b) of the LMRDA to compel the payment of fees and expenses. The Court of Appeals for the Eighth Circuit affirmed the decision to award counsel fees stating that, "We are by no means announcing a rule requiring payment of attorneys' fees to successful union member litigants in every Title I court proceeding—regardless of the circumstances." 325 F.2d 646 at 654. The court cited Vars, supra, but distinguished it on the factual points that in Vars there was an attempt

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constitution and bylaws of any labor organization." Cf. Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448, 457, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957); Parks v. Int'l Bhd. of Electrical Workers, 314 F.2d 886, 903 (4 Cir. 1963). However, because of the decision reached by this Court it will be unnecessary to expand this point. But see: Leg.Hist., Vol. II, p. 1281 (where Senator Goldwater remarks on the preservation of remedies under state common law principles); Hickey, The Bill of Rights Of Union Members, 48 Geo.L.J. 256 (1959); Prevailing Union Member's Right to Recover Attorneys' Fees In Action Against Union Or Union Officers, 9 A.L.R.3d 1045.

to recover fees in the Title I action[3] plus the conspicuous absence of the union vote approving the payment by the local.

The District Court below in denying appellant's claim for expenses considered the expressions of Senator Goldwater to mirror the legislative intent, citing the opinions in Vars, McCraw and Cole as further authority for that view. Distinguishing Johnson v. Nelson, supra, the District Judge commented that "of prime significance" in the Johnson case was the membership vote to reimburse the litigants, which fact does not appear in this appeal.[4]

COUNSEL FEES AS PROPER RELIEF UNDER SECTION 102

It does not seem that to date the legislative intent in the LMRDA as to counsel fees has been closely examined, indeed the specific language of Section 102, if anything, has been unwarrantably circumscribed. The Act gives the federal courts, in precise terms, the authority to dispense "relief (including injunctions) as may be appropriate." In the search for an explanation of what appropriate relief entails the courts have found regnant the remarks made in the dissenting House Report and those of the Senator from Arizona. It should be noted that neither of those commentaries were voiced as a part of the floor debate on

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[3] The case before the Eighth Circuit differs in that it was brought under Title V, Section 501(b), subsequent to the title I proceeding and subsequent to the consensual vote by the local membership.

[4] Other cases which have passed on the allowance of counsel fees under Section 102, but without discussion of the merits, are: Jacques v. Local 1418, Int'l Longshoremen's Ass'n, 246 F.Supp. 857 (E.D.La.1965); Leonard v. M. I. T. Employees' Union, 225 F.Supp. 937 (D.Mass.1964); Magelssen v. Local Union No. 518, Operative Plasterers, 240 F.Supp. 259 (W.D. Mo.1965); Bailey v. Netter, 266 F.Supp. 165 (E.D.La.1967).

the Act in either the House or Senate.[5] Senator Goldwater's sincere statement did point up the need of enabling a single member to enforce his rights. It did not attempt to analyze the efficacy of the phrase use to cover the relief which might be needed including counsel fees. The Senator's offhand thought was that "* * * the bill does not grant him [a union member suing under Section 102], even where successful in his suit, reasonable counsel fees or other costs." Leg.Hist., Vol. II, p. 1281. Yet many forms of relief and costs have been recognized under Section 102, including: strike benefits, Vars v. Int'l Bhd. of Boilermakers, supra; punitive damages, Farowitz v. Associated Musicians of Greater N. Y., Local 802, A. F. of M., 241 F.Supp. 895 (S.D.N.Y.1965), aff'd 330 F.2d 999 (2 Cir. 1964);[6] injury to reputation with accompanying mental anguish,[7] Simmons v. Avisco, Local 713, Textile Workers Union, 350 F.2d 1012 (4 Cir. 1965); and in this suit before the District Court plaintiff recovered "legally allowable

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[5] Senator Goldwater's views were those he expressed before the Committee on Education and Labor, of the House of Representatives on June 3, 1959 and printed in the Congressional Record, without objection, at the suggestion of the Senator. Leg.Hist., Vol. II, p. 1280.

The dissenting House Report, made by nine members of the House Committee on Education and Labor, opposed the reporting of H.R. 8342 (the Elliott Bill) to the House of Representatives. It is worthy of comment that H.R. 8342, (the Elliott Bill) was not the Landrum-Griffin Bill, H.R. 8400, eventually passed by the House. However, the language pertaining to relief under the civil enforcement provisions of both bills is for all practical purposes the same.

[6] In Burriss v. Int'l Bhd. of Teamsters, 224 F.Supp. 277 (W.D. N.C.1963), the court held punitive damages to be unrecoverable under Section 102. See also Cole v. Hall, 35 F.R.D. 4 (E.D.N.Y. 1964).

[7] Emotional distress, standing alone, has been held not to constitute a sufficient basis for awarding damages under Section 102. Int'l Bhd. of Boilermakers, etc. v. Rafferty, 348 F.2d 307 (9 Cir. 1965).

costs."[8] The damages permissible under Section 102 have been set to include only those directly and proximately resulting from a violation of the Act. McCraw v. United Ass'n of Journey. & App. of Plumbing, supra; Simmons v. Avisco, Local 713, Textile Workers Union, supra. But there does not appear to be, in the cause presented for counsel fees, any element less direct or proximate which would alienate that relief from the type of award handed down in the above cited cases. Certainly the litigation costs borne by a union member who successfully asserts his rights under Title I is not collateral to but directly results from a violation of that member's rights by the union.

It is not disputed that some members of Congress wished to provide expressly for counsel fees under Section 102. Other legislators indicated that such a provision might not be consistent with the broad powers given the courts to furnish relief "as may be appropriate." Senator Clark of Pennsylvania, while commenting on the Kuchel amendment, stated that "* * * it takes the Federal bureaucracy out of this bill of rights and leaves its enforcement to union members, aided by the courts." Leg.Hist., Vol. II, p. 1233. Significantly, Senator Clark's statement was iterated by Senator McClellan, the author of the LMRDA bill of rights, in a supplement to his testimony before the House Education and Labor Committee. Leg.Hist., Vol. II, p. 1294. Before the House of Representatives a detailed explanation of the Elliott Bill (see footnote 5), prepared by Rep. Elliott himself, was read into the record. Considering the remedies available under the bill of rights enforcement section, Rep. Elliott stated:

> "Thus a suit to prevent and restrain a violation of the so-called bill of rights might terminate in an injunc-

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[8] The Conclusions of Law filed by the District Judge below read in part:

> "6. Plaintiffs, having successfully prosecuted these suits, are entitled to legally allowable costs."

> tion, but also in an order setting aside discipline imposed by a labor organization, and restoring the plaintiff to membership if appropriate, and awarding monetary damages if suffered. The court's jurisdiction '* * * to grant such other and further relief as may be appropriate' *gives it a wide latitude to grant relief according to the necessities of the case.*" (Emphasis supplied.) Leg.Hist., Vol. II, p. 1584.

Representative O'Hara of Michigan was of a mind that:

> "These rights are enforced effectively and fairly by civil actions in the Federal courts. In such suit the court can award money damages to compensate *any loss* suffered by a member through denial of any of the enumerated rights and can enjoin any repetition of actions which deprive the member of his rights." (Emphasis supplied.) Leg.Hist., Vol. II, p. 1632.

In attempting to extract the legislative purpose primary concern should always be given to the views expressed by the sponsors of the bill and in this respect the statements of Senator McClellan and Rep. Elliott should be looked to as representing the true spirit of Section 102. See National Woodwork Manufacturers Assn. v. N.L.R.B., 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967); Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951).

It is apparent that under Section 102 the courts, in considering each case, individually, on its merits, were intended to be the arbiters of both legal and equitable relief. Clearly Congress made no move to expressly limit or prescribe the scope of recovery under the enforcement section. Further, in spelling out remedies there is a danger that those not listed might be proscribed with the result that the courts would be fettered in their efforts to "grant relief according to the necessities of the case." See Fleischmann

v. Maier Brewing, 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967).

In deciding that counsel fees are proper items of recovery under Section 102 it is important that we have not found any prior decisions compelling a contrary conclusion. Most instances which have denied the relief sought here have relied too readily and too strongly on Vars v. Int'l Bhd. of Boilermakers, supra, for the proposition that the courts are without power to grant counsel fees under Section 102. We question that the District Court in Vars meant to be that restrictive; it at least seemed to indicate that exemplary damages might include an item for counsel fees where defendant's actions were motivated by wilful malice.[9] Also, the court in Vars based its decision partly on the belief that counsel fees were not compensable damages. Recently the Supreme Court has indicated that such fees do constitute compensable damages.[10] And we have the fact that other sections[11] of the LMRDA which specifically call for the awarding of counsel fees in no way controls the legislative intent with respect to Section 102. In the instances where such awards are made the actions are narrowly defined to an examination of books and records

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[9] The court stated at 215 F.Supp. 943, 952:

> "In its wisdom Congress refrained from including attorneys fees as an item of damages. No issue has been raised in this litigation that the defendant's actions were motivated by willful malice nor has any claim been made for exemplary damages because of malice. Counsel fees and expenses are not compensable damages and are hereby denied."

[10] Speaking on the recoverability of counsel fees under the Lanham Act the Court stated that "[a] judicially created compensatory remedy in addition to the express statutory remedies is inappropriate in this context." Fleischmann v. Maier Brewing, 386 U.S. 714, 87 S.Ct. 1404 (1967).

[11] Section 201(c), 29 U.S.C.A. § 431(c) and Section 501(b), 29 U.S.C.A. § 501(b).

under Section 201(c) and an accounting under Section 501 (b). Neither section can be compared with an action to enforce a union member's bill of rights where the relief must be tailored to fit facts and circumstances admitting of almost infinite variety.

The case of Johnson v. Nelson, supra, where counsel fees were awarded, was not deemed controlling by the District Court below since the fees there were approved by a majority vote of the union membership. That distinction is not sound and does not come to grips with the fundamental problem of whether the courts have the power to dispense relief which might include compensation for legal expenses. It will be remembered that in Johnson an action was brought under Title I resulting in a stipulation which set up a Special Trial Board. It was only after the Special Trial Board recommended that attorneys' fees be awarded to both sides in the dispute that the vote of approval was taken. Thereafter a suit under Title V of the LMRDA was instituted by union members to recover the fees the union refused to pay. Upholding the allowance of counsel fees the Eighth Circuit stated:

> "Vars v. International Brotherhood of Boilermakers, etc., D.Conn., 215 F.Supp. 943, 952 (1963)—cited by appellants in oral argument—is not contrary to our decision here. In Vars, the union member asserting violation of rights under Title I attempted to recover his attorneys' fees in that very Title I action, and—among other factual differences—there had been no union vote approving such expenses to be paid by the local." 325 F.2d 646 at 654.

Factual hairsplitting and case distinctions do not govern the issue on this appeal. Reimbursement for legal costs is proper only if the power to bestow such relief is invested in the courts under Section 102. In Johnson the Special Trial Board which recommended the reimbursement of

counsel fees by the union local was born out of the Title I proceeding. That is, the relief granted in the first district court action made the Special Trial Board a reality which in turn allowed the recovery of fees and expenses. The vote by the union membership was an approval of the Board's award, an award which indirectly accomplished what allegedly might have seemed to be forbidden directly in a suit under Title I of the LMRDA. Johnson v. Nelson of itself does not solve completely our decisive point and the resulting implications now faced by this Court, but in reaching a decision it must be considered and cannot easily be distinguished.

Section 102 bestows upon the Federal district courts the authority to grant "relief (including injunctions) as may be appropriate." It should be emphasized that these words are not of the limiting type found in Fleischmann v. Maier Brewing, supra, to restrict recovery to those remedies which are expressly set forth in the statute. In contrast, the scope of authority under Section 102 and the flexibility with which that power may be exercised is practically unlimited in view of the courts' legal and equitable jurisdiction. Judge Sobeloff of the Fourth Circuit correctly stated that:

> "The parenthetic specification of the words 'including injunctions' must have been designed to broaden the possible relief to include the equitable remedy, but it cannot be construed to dislodge other forms of relief such as the award of damages where appropriate. The 'civil action' which the statute authorizes embraces legal as well as justification for a narrower construction." Simmons v. Avisco, Local 713, Textile Workers Union, 350 F.2d 1012 at 1019 (4 Cir. 1965).

The varieties of relief, among them the recovery of counsel fees, endemic to any exercise of equitable jurisdiction by our federal courts cannot be contravened. Justice Frankfurter made it clear that "[a]llowance of such costs in ap-

propriate situations is part of the historic equity jurisdiction of the federal courts." Sprague v. Ticonic Bank, 307 U.S. 161, 164, 59 S.Ct. 777, 779, 83 L.Ed. 1184 (1939).[12] Plainly the federal courts are empowered under Section 102 to come to the aid of any union member whose civil rights have been infringed upon by the union and to compensate that member for reasonable counsel fees and other expenses resulting from that Title I action.

The Eighty-sixth Congress of the United States, acting on recommendations of the McClellan Committee, was faced with the task of fashioning legislation to curb the racketeering which threatened to annul the hard fought gains of this country's honest working men and women. The Labor-Management Reporting and Disclosure Act of 1959 was the Congressional answer which attempted to strengthen the individual rights of labor union members and to rid the labor movement of the unsavory elements with which it had unfortunately become associated. Setting forth its findings, purposes and policy Congress found:

> "* * * from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their

[12] Although the Supreme Court distinguished the Sprague case in Fleischmann v. Maier Brewing, supra, its reasoning seemed to turn on the fact that the Sprague rule was not "* * * developed in the context of statutory causes of action for which the legislature had prescribed intricate remedies." As mentioned above Section 102 is not the type of statutory cause of action that prescribes "intricate remedies."

officers and representatives." 73 Stat. 519 (1959), 29 U.S.C. § 401(b) (1964).

Thus Section 102 of the LMRDA opens the door of the federal judicial system to the individual union member whose rights have been infringed upon except that stark reality might slam the door in that litigant's face when confronted with the insurmountable obstacles of prohibitive legal expenses.[13] In construing the statute the court must consider the purpose of its enactment, the evil to be eradicated, the object to be obtained and recognize the construction that would best effectuate those standards. Carter Oil Co. v. Norman, 131 F.2d 451, 457 (7 Cir. 1942); United States v. Chase, 135 U.S. 255, 261, 10 S.Ct. 756, 34 L.Ed. 117 (1890). With this in mind the interpretation reached by this Court is consonant with the Congressional desire of passing "legislation that will afford necessary protection of the rights and interests of employees and the public generally." In the context of the Labor Management Act it is untenable to assert that in establishing the bill of rights under the Act Congress intended to have those rights diminished by the unescapable fact that an aggrieved union member would be unable to finance litigation and would have no hope of remuneration even if he could some way or other proceed with his suit.

As is revealed by its voluminous legislative history, in the heavy pressure atmosphere attending the creation of the Labor Management bill of rights legislation there was a manifest reluctance to specifically detail the individual's right to reimbursement for counsel fees expended in defeating his union's effort to deprive him of his fundamental rights as a member. Nevertheless, the Congress was successful in protecting that right by giving such union

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[13] See Summers, The Law of Union Discipline; What the Courts Do in Fact, 70 Yale L.J. 175, 220-222 (1960).

member "appropriate relief". That phrase, while it avoided spotlighting the making available of necessary material assistance to a single unionist fighting his lonely battle for justice, did take care of the situation by means of the deliberately general language used. In the clear light of the latter, if the Congress had concluded to reverse its field and tear up the bill of rights it had drafted, it would have stated that there would be no counsel fees allowed. Absent this, "appropriate relief" fairly construed must be held to include proper counsel fees.

From all of the above we therefore hold that under Section 102 of the Labor-Management Reporting and Disclosure Act of 1959 the federal district courts have the discretionary power, and may, when they deem it proper, award reasonable counsel fees to a union member or members who have in good faith pursued their rights under Title I of the Act.

That part of the judgment of the District Court will be reversed as to its holding that as a matter of law counsel fees could not be awarded plaintiffs in this litigation. The balance of the District Court judgment will be affirmed. The case will be remanded for further proceedings with respect to plaintiffs' application for counsel fees, in accordance with this opinion.

NEALON, District Judge (dissenting).

Ordinarily, counsel fees are not recoverable as damages or taxable as costs. Fleischmann v. Maier Brewing Company, 386 U.S. 714, 87 S.Ct. 1404 (1967). If counsel fees are to be allowed in this statutory proceeding, then, as the majority opinion states, such reimbursement "* * *is proper only if the power to bestow such relief is invested in the courts under Section 102." Congress specifically authorized payment of counsel fees in enforcement actions

under Section 201(c)[1] and Section 501(b)[2], but did not adopt the same language in a Title I proceeding enforceable under Section 102. As a matter of fact, the enforcement language in Section 102 is similar to that applicable in

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[1] Title II, § 201(c) provides:

"(c) Every labor organization required to submit a report under this subchapter shall make available the information required to be contained in such report to all of its members, and every such labor organization and its officers shall be under a duty enforceable at the suit of any member of such organization in any State court of competent jurisdiction or in the district court of the United States for the district in which such labor organization maintains its principal office, to permit such member for just cause to examine any books, records and accounts necessary to verify such report. The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

[2] Title V, § 501(b):

"(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for the good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation."

enforcement proceedings under Sections 210[3] and 304(a).[4] It is interesting to note that, as in Section 210 and 304(a) proceedings, the only party authorized to seek relief in the original version of Section 102, the McClellan amendment, was the Secretary of Labor. This was changed, as the majority opinion notes, to avoid "the bureaucratic chaos that might result if the Secretary of Labor were required to initiate all complaints on behalf of aggrieved union members." Obviously, the Secretary would not be entitled to reimbursement for counsel fees under Sections 210, 304(a) or the original language of 102. Thus, it would appear that counsel fees were never considered by Congress as coming within the remedy of "* * * such relief * * * as may be appropriate." Although a broad, liberal reading of Section 102 might support the conclusion reached by the majority here, I find no Congressional authorization for such a reading and, indeed, all Congressional comment contained in the legislative history is to the contrary.[5] I would affirm the judgment of the District Court.

[3] Title II, § 210 provides, in pertinent part:

"Whenever it shall appear that any person has violated or is about to violate any provisions of this subchapter, the Secretary may bring a civil action for such relief (including injunctions) as may be appropriate."

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[4] Title III, § 304(a) provides, in pertinent part:

"(a) Upon the written complaint of any member or subordinate body of a labor organization alleging that such organization has violated the provisions of this subchapter (except section 461 of this title) the Secretary shall investigate the complaint and if the Secretary finds probable cause to believe that such violation has occurred and has not been remedied he shall, without disclosing the identity of the complainant, bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate."

[5] Senator Goldwater's views as contained in Legislative History, Vol. II, p. 1281, and the dissenting House Report, U. S. Code Cong. & Adm. News, Legislative History, Vol. 2, 86th Cong., 1st Sess., p. 2492 (1959).

Received and Filed Sept. 1, 1967

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 16,291

ROBERT A. GARTNER, *Appellant*

v.

JACK SOLONER, President, and ROBERT C. BRENNAN, Secretary-Treasurer, and AMERICAN BAKERY & CONFECTIONERY WORKERS INTERNATIONAL UNION AFL-CIO LOCAL 492

(D.C. Civil Action No. 33707)

On Appeal From the United States District Court for the Eastern District of Pennsylvania

Present: McLAUGHLIN and GANEY, *Circuit Judges*, and NEALON, *District Judge*.

Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the findings of fact and conclusions of law filed February 28, 1966 and the judgment of the said District Court filed April 19, 1966, be, and the same are hereby reserved as to its holdings that as a matter of law counsel fees could not be awarded plaintiffs in this litigation. The balance of the District Court judgment will be affirmed. The case will be remanded for further proceedings with respect to plaintiffs' application for counsel fees, in accordance with the opinion of this Court.

ATTEST:

THOMAS F. QUINN
Clerk

September 1, 1967

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

[Caption omitted]

Findings of Fact, Discussion and Conclusions of Law

LUONGO, J. February 28, 1966

The above captioned cases came on for trial on final hearing. Both suits were instituted under the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. A. §§ 401-531 (hereinafter LMRDA), by union member plaintiffs seeking to enjoin defendant union and defendant officers from fining and suspending plaintiffs from membership in violation of plaintiffs' rights, as union members, to freedom of speech and assembly.

Earlier in these proceedings, hearings were held and preliminary injunctions were issued by Judge Harold K. Wood in Civil Action No. 33707 on July 3, 1963, and by Judge Joseph S. Lord, III, in Civil Action No. 33876 on August 27, 1963. Findings of Fact and Conclusions of Law were filed in support of the issuance of the preliminary injunctions. In summary, plaintiffs, members of a minority group within the union, had picketed criticizing the defendant officers and had been fined and suspended for doing so. In the preliminary injunction proceedings it was determined that such disciplinary action was in violation of plaintiffs' rights of freedom of speech and assembly guaranteed them under the LMRDA and, therefore, unlawful. Since no further evidence was presented at the final hearing on the matters as to which the preliminary injunctions issued, I adopt, by reference, Findings of Fact 1 through 19 entered by udges Wood and Lord in the preliminary injunction hearings as Findings of Fact 1 through 19 on final hearing in each case and I will make permanent the injunctions issued preliminarily. In Civil Action No. 33876

the fines for non-attendance at meetings have since been paid and that issue is no longer in the case.

In each case plaintiffs sought punitive and compensatory damages in addition to injunctive relief. Plaintiffs have conceded that there is no authority in law for punitive damages and have abandoned that claim, leaving only the claim for compensatory damages. They seek reimbursement for losses resulting from and expenses incurred in accomplishing their reinstatement to membership, including amounts expended for legal services, loss of wages for time spent in attending union hearings and court proceedings, and expenses incident to the court proceedings. As to these claims, I make the following

ADDITIONAL FINDINGS OF FACT IN CIVIL ACTION No. 33707.

20. Gartner engaged the law firm of Hamilton, Darmopray and Malloy to perform legal services to secure his reinstatement to membership in the Union.

21. Gartner was charged and paid a fee of $1,000 for said legal services. The fee for said legal services was reasonable.

22. In addition, Gartner incurred the following expenses in connection with said legal proceedings:

Clerk, U. S. District Court fee for filing Complaint	$15.00
U. S. Marshal's fees	10.92
Clerk, U.S. District Court Copy of Judge Wood's Findings and Conclusions	5.85
Premium on Preliminary Injunction Bond, 3 years at $20 per year	60.00

IN CIVIL ACTION NO. 33876.

20. Graham,[1] Froelich, McKeon and Sutherland engaged the law firm of Hamilton, Darmopray and Malloy to perform legal services to secure their reinstatement to membership in the Union.

21. They were charged and paid a total fee of $1,000 for said legal services, each paying $250 thereof. The fee for said legal services was reasonable.

22. In addition, Sutherland paid the following expenses in connection with said legal proceedings:

Clerk, U. S. District Court fee for filing Complaint	$15.00
U. S. Marshal's fees	19.92
Clerk, U. S. District Court Copy of Judge Lord's Findings and Conclusions	5.85
Premium on Preliminary Injunction Bond, 3 years at $20 per year	60.00

23. In addition to the amount paid for legal services, Beatrice McKeon lost time from work, at the rate of $2.23 per hour, as follows:

8 hours for attendance as witness at Gartner's trial	$17.84
4 hours attending Union hearing on charges brought against her	8.92
8 hours attendance at court at preliminary injunction hearing before Judge Lord	17.84

[1] Since the institution of these suits, plaintiff Graham has died. Although no person has been substituted for the deceased, this technical omission is without significance in view of the outcome of these cases.

24. In addition to the amount paid for legal services and the expenses enumerated in Finding No. 22, George Sutherland lost time from work, at the rate of $2.68 per hour, as follows:

8 hours for attendance as witness at Gartner's trial	$21.44
4 hours attending Union hearing on charges brought against him	10.72
8 hours attendance at court at preliminary injunction hearing before Judge Lord	2144

25. In addition to the amount paid for legal services, Margaret Froelich lost time from work, at the rate of $2.25 per hour, as follows:

8 hours for attendance as witness at Gartner's trial	$18.80
4 hours attending Union Hearing on charges brought against her	9.40
8 hours attendance at court at preliminary injunction hearing before Judge Lord	18.80

26. Joseph Graham, in addition to the amount paid for legal services, lost time from work, at the rate of $2.87½ per hour, as follows:

8 hours for attendance as witness ast Gartner's trial	$23.00
4 hours attending Union hearing on charges brought against him	11.50
8 hours attendance at court at preliminary injunction hearing before Judge Lord	23.00

Discussion.

Plaintiffs have been successful in their quest for injunctive relief under §§ 101(a)(2), 609 and 102 of the LMRDA, 29 U. S. C. A. §§ 411(a)(2), 529 and 412. They claim, in addition, money damages to reimburse them for amounts expended in legal services, costs and other expenses[2] in enforcing their rights under those sections. With the exception of certain so-called "taxable costs" (see 28 U. S. C. A. § 1920), plaintiffs' requests for reimbursement must be denied.

Section 102 of the LMRDA, upon which jurisdiction in these cases is founded, provides as follows:

> "Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States *for such relief (including injunctions) as may be appropriate . . . .*" (Emphasis supplied.)

It is plaintiffs' position that the above language manifests a clear intention on the part of Congress to invest in the district courts wide discretion in the awarding of relief, including money damages for reimbursement for expenses reasonably incurred in vindicating the individual rights of union members. Any other interpretation, say plaintiffs, would thwart the purpose of the Act which was passed to provide an effective means for the enforcement of the rights of individual union members vis-a-vis their own unions.

Defendants, on the other hand, read the Congressional mind differently. They argue that while Congress was

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[2] The specific items for which plaintiffs seek reimbursement appear in Findings Nos. 21 and 22 in Civil Action No. 33707 and in Findings Nos. 21 to 26, inclusive, in Civil Action No. 33876.

anxious to provide a "Bill of Rights" for union members, it did not intend to shift the cost of enforcing those rights to the unions themselves. Although the result seems harsh to union members who are forced to resort to court proceedings to curb abuses of authority by their union leaders, I am compelled to agree with the defendants' position.

A careful reading of both the Senate and House debates on what ultimately culminated in the LMRDA supports the following statement of Senator Goldwater made to the House Committee on Education and Labor which was, at the time of the statement, considering the Senate-passed version of the Bill. He said:

> "Although the bill [particularly § 102] permits the union member himself to sue for infringement of his rights, the nature of the suit is such as to promise, even if successful, little in the way of monetary damages except in the rare case where the plaintiff's job rights or job tenure have been adversely affected. Moreover, the *bill does not grant him, even where successful in his suit, reasonable counsel fees or other costs. It thus forces him to assume the entire financial burden of the litigation.*" (Emphasis supplied.) Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Vol. 2, p. 1281.[3]

Senator Goldwater's analysis has been subsequently borne out by the few reported decisions that have considered the problem of assessment of costs and fees in cases like the instant ones. Thus, in *Vars* v. *Int'l Bhd. of*

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[3] It is not without significance that Congress, when it intended to provide counsel fees or costs to successful litigants under LMRDA did so expressly. See Title V § 501(b). No such provision appears in Title I under which plaintiffs are proceeding. See Cole v. Hall, 35 F. R. D. 4, 8, E. D. N. Y. 1964). The fact that plaintiffs here have not asked for counsel fees per se but rather for reimbursement for costs of legal services appears to be a distinction without a difference.

Boilermakers, 215 F. Supp. 943 (D. Conn. 1963), *aff'd.,* 320 F. 2d 576 (2d Cir. 1963), where plaintiff sought not only an injunction under § 102, but also reimbursement for counsel fees, a hearing transcript, telephone calls, loss of a strike payment, and loss of wages due to attendance at trial, the court ruled that with the exception of the strike benefit payments, "[c]ounsel fees and expenses [were] not compensable damages . . . ." *Id.* at 952. To the same effect are *McCraw* v. *United Ass'n of Journeymen,* 216 F. Supp. 655 (E.D. Tenn. 1963), *aff'd.,* 341 F. 2d 705 (6th Cir. 1965) and *Cole* v. *Hall,* 35 F. R. D. 4 (E. D. N. Y. 1964).[4]

Plaintiffs do not discuss the above authorities, but instead cite two other cases to support their position. Neither one does. The first *Johnson* v. *Nelson,* 325 F. 2d 646 (8th Cir. 1963), involved a suit under § 501 of the Act to compel union officers to pay to plaintiffs certain moneys as reimbursement for counsel fees and other expenses incurred in a previous suit to set aside improper disciplinary proceedings. The action was predicated upon a vote of the union members authorizing such payment. In affirming a decision compelling payment, the Court of Appeals carefully limited the case to its facts and noted that it was ". . . of prime significance . . . that a duly authorized constitutional majority of Local's members voted to pay appellees' expenses . . . ." Id. at 653. That fact is absent from the instant cases.

The second case upon which plaintiffs rely, *Gilbert* v. *Local 701,* 384 P. 2d 136 (Ore. 1963), *cert. denied,* 376 U. S. 963 (1964), is completely inapposite since it involved a state proceeding outside the purview of the LMRDA.

From the foregoing, it is apparent that plaintiffs' claims for reimbursement for cost of legal services and loss of wages must be denied. Plaintiffs, of course, will be per-

[4] For a recent case disallowing a substantial award under § 102 for emotional distress see Int'l Bhd. of Boilermakers, 348 F. 2d 307 (9th Cir. 1965).

mitted to file, in due course, their statuptory bill of costs which will undoubtedly include the Clerk's filing fees and the Marshal's costs for service. Claim for other allowable costs (as for example witness fees, if applicable) should be submitted to the Clerk at that time.

CONCLUSIONS OF LAW

CIVIL ACTION NOS. 33707 AND 33876.

1. The court has jurisdiction of the parties and the subject matter, 29 U. S. C. A. § 412.

2. The suspension and fining of the plaintiffs were in violation of the Labor-Management Reporting and Disclosure Act of 1959, 29 U. S. C. A. §§ 411(a)(2) and 529.

3. Plaintiffs will be irreparably harmed if the preliminary injunctions heretofore issued are not made permanent. Plaintiffs cannot be compensated in money damages for the violation of their rights.

4. Plaintiffs* are entitled to a permanent injunction enjoining defendants from depriving plaintiffs of the right to attend and to participate in Union meetings and from suspending them from membership for exercising the rights guaranteed them by the Labor-Management Reporting and Disclosure Act.

5. Plaintiffs are not entitled to reimbursement for amounts expended by them for legal services in securing reinstatement to membership in the Union or for wages lost while attending Union hearings or court proceedings.

6. Plaintiffs, having successfully prosecuted these suits are entitled to legally allowable costs.

An appropriate order in each case incorporating the permanent injunction may be submitted upon notice.

/S/ ALFRED L. LUONGO, *J.*

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* Plaintiff Graham in Civil Action No. 33876 having died, the injunction is moot as to him.

Order

AND NOW, this 18th day of April, 1966, pursuant to the Findings of Fact, Discussion and Conclusions of Law filed by the Court on the 28th day of February 1966, it is hereby ORDERED and DECREED that:

1. Defendants are permanently enjoined from depriving plaintiff of the right to attend and to participate in Union meetings and from suspending him from membership for exercising his rights guaranteed him by the Labor-Management Reporting and Disclosure Act.

2. Defendants shall vacate the suspension of plaintiff from the Defendant, American Bakery & Confectionery Workers International Union AFL-CIO, Local 492, and the fines simultaneously imposed.

3. Plaintiff shall be reinstated as a member in good standing of the Defendant, American Bakery & Confectionery Workers International Union AFL-CIO, Local 492.

ALFRED L. LUONGO, *J.*